IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Cr.Appeal No.240 of 2006

Reserved on: 16.4.2007

Date of decision:15.5.2007

Amar Bahadur ... Appellant.

Versus

State of H.P. ... Respondents.

Coram

The Hon'ble Mr. Justice V.K.Ahuja, J.

Whether approved for reporting[1]*?*

For the appellant: Ms.Sunita Sharma, Advocate.

For the respondent: Mr.J.S.Gulera, Law Officer.

V.K.Ahuja, J.

This is an appeal filed by the appellant against the judgment of the Court of learned Sessions Judge, Mandi dated 7.6.2006 vide which the appellant was held guilty under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, hereafter referred to as the 'Act', and was sentenced to undergo rigorous imprisonment for a period of four years and to pay a fine of Rs.20,000/-. In default of payment of fine, the appellant was to further undergo simple imprisonment for a period of three months.

Briefly stated, the facts of the case are that 23.10.2004 at about 3.30 AM ASI Ram Lal along with HC Balwant Singh PW-2, PW-6 Roshan Lal Constable and other police officials was present at Pandoh Dam in connection with traffic checking. Bus bearing

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[1] Whether the reporters of Local Papers may be allowed to see the Judgment?

No.HP-65 0317 came from Kullu side which was stopped by the police party and the documents of the vehicle were checked by ASI Ram Lal. Thereafter ASI Ram Lal started checking of the passengers and the driver of the bus, namely, Kashmir Singh PW-1 and Conductor Surender Kumar were also associated in the checking of luggage. It is in evidence that Ram Lal ASI along with other police officials reached near the seat No.25, the appellant also referred to as an accused, who was occupying that seat, became perplexed on seeing the police party. The accused was having a bag kept by the side on his seat. He tried to take out something from his waist and on checking it was found that something was wrapped around his waist with a woolen belt which was also having a chain. On checking, the accused was found carrying polythene packet in the purse of the bag and when it was checked it was found containing Charas, which on weighment was found to be 400 gms. The Charas was weighed in the presence of the witnesses. 50 gms. of Charas was taken out separately and was divided in two equal parcels of 25 gms. each and the samples were separately sealed and were sealed with seal “R” at six places. NCB Form was prepared separately. The specimen seal R was also taken on Ex.PA and the seal after use was handed over to PW-1 Kashmir Singh. The charas was taken in possession vide memo. Ex.PB and a personal search of the articles was also taken vide memo. Ex.PC Ruka was prepared which was sent to Police Station for registration of a case. On receipt of the Ruka by PW-7 ASI Lal chand who was posted as Investigating Officer at Police Station Sadar Mandi, he recorded FIR Ex.PG and also made

endorsement on Ruka Ex.PH. The case property was deposited with PW-9 SHO N.K.Sharma who resealed the case property with his seal. The packet of samples and the remaining Charas were sealed with mark “C”. He filled in the NCB forms and deposited the case property with HHC Baldev Singh PW-4. One sample parcel duly sealed with Seal R & C along with NCB form etc. was sent to Chemical Analyst, Kandaghat through PW-3 HHC Dharam Chand who deposited them there and handed over the receipt to MHC Baldev Singh. A special report was prepared and was sent to S.P.Mandi which was received by PW-5 SI Ram Lal the then Reader to S.P.Mandi and he put up the same before Shri Ajay Yadav S.P.Mandi on 25.10.2004 at 10.10.A.M. The said report is Ex.PC which was signed by S.P.Mandi in presence of PW-5 SI Nand Lal who made entries in the register with regard to receipt of special report. On receipt of the report of the Chemical Examiner the challan was filed before the trial Court, who tried the appellant under Section 20 of the Act leading to the conviction and sentence imposed by learned trial Court as mentioned above.

I have heard Ms Sunita Sharma, learned counsel for the appellant and Mr. J.S.Guleria, Law Officer for the respondent-State.

The submissions made by the learned counsel for the appellant were that there are various infirmities in the prosecution case and, therefore, in view of the infirmities in the statements of the witnesses, the same cannot be relied upon. The date of checking has been incorrectly mentioned in the special report sent to S.P.Mandi, that seals were not produced during the trial of the

case and it is not clear as to how the sample of 25 gms. was taken when no weights of 25 gms. were available with the Investigating Officer. It was also submitted that necessary link evidence is missing since the Malkhana register was not produced during the trial of the case. Lastly, it was submitted that the provisions of Section 50 of the Act were not complied with since it was a case of personal search of the accused.

On the other hand, the learned Law Officer for respondent had submitted that contradictions and infirmities referred to are minor in nature and there are no material contradictions in regard to the weight of 25 gms. It was submitted that no questions were put up as to how the Charas was divided in two parts. In regard to the provisions of Section 50 the Act, it was submitted that these provisions are not applicable in case of chance recovery when no prior information is available with the Investigating Officer.

Coming to the contradictions and infirmities referred to above, the recovery in question was effected on 23.10.2004. A perusal of the special report Ext.PF also shows that it was mentioned therein that on 23.10.2004, ASI Ram Lal along with other police officials was present when he checked the person of the accused and effected recoveries. The special report was received on the next date i.e. 24.10.2004 and it is correctly mentioned therein. However, a perusal of Ext.PF shows that in the last while sending the special report the Officer In charge P.P.Pandoh ASI mentioned the date along with his signatures as 24.8.2004. At two other places also, it has been clearly mentioned

that the accused was apprehended on 23.10.2004 and the case property was also deposited with SHO on 24.10.2004. Thus, it is clear that this date 24.8.2004 was wrongly mentioned by the Investigating Officer while signing the special report which mistake can be said to be unintentional and in view of the dates mentioned in the special report at several places correctly, it cannot be taken as a ground to disbelieve the prosecution story. In regard to the plea that the seal was not produced, there is a statement of PW-1 Kashmir Singh Driver of the bus who was associated as an independent witness that the seal after use was handed over to him. He did not state about the seal that it has been brought by him today in Court or it has been lost and no questions were put up to him in this regard also. There is no requirement of law that the seal given to independent witness must be produced during the trial of the case and in case it is not produced during the trial of the case, it becomes fatal to the prosecution story. The question of non-production of the seal was considered by a division Bench of this Court in ***Jauni Ram v. State of H.P***. 2005(1) Shim. L.C.54 and it was held that mere non-production of specimen seal during the course of trial cannot lead to inference that the entire seizure and recovery is wrong and illegal.

This question was also considered by this Court in ***Rajesh Basniyat v. State of H.P.*** Latest HLJ 2004(HP) 875 wherein it was observed by this Court that there is no law or rule which makes it mandatory to produce the seal in evidence at the trial. Both these decisions are attracted to the present facts and in the present case there is a specific statement of PW-1 Kashmir Singh that the sealed

parcel was produced which are Ext. P-1 and Ex.P-2 and the seals were found intact also on these parcels. The plea put forth by the learned counsel for the appellant is devoid of any force that the non-production of seal affects the prosecution story.

Coming to the plea that the weights of 25 gms were not available with the Investigating Officer, and, therefore, how the sample was taken of 25 gms. PW-1 Kashmir Singh has stated that there were 4-5 weights available with Investigating Officer. PW-2 Balwant Singh has stated that the weights were of 1 Kg., 500gms, 200gms, 100gms and 50 gms. Which were available with the Investigating Officer. No questions were put up to either of these two witnesses as to how the sample of 25 gms. was taken. However, PW-1 Kashmir has stated that the police took out 50 gms. separately, which was again divided into two parts of 25 gms. each Therefore, it is clear that since weight of 50 gms was available, 50gms was taken separately and it was divided into two parts and, therefore, no infirmity can be found in the prosecution story in this regard.

Coming to the next plea that the Malkhana register was not produced. PW-9 SHO N.K.Sharma has stated that the case property was produced before him by ASI Ram Lal and resealed the same and handed over the case property to HHC Baldev Singh Malkhana In charge. However, no questions were put up to him in regard to the entries in the Malkhana Register nor any questions were put to PW-4 MHC Baldev Singh in this regard. In case there was some infirmity or doubt regarding the entry in the Malkhana Register, either of these two witnesses could have been

asked during cross-examination to produce the register on the next date. It cannot be said that the statement of both these witnesses made on oath can be disbelieved simply because Malkhana register was not produced during the trial of the case. The statement made on oath cannot be disbelieved and therefore, non production of Malkhana register does not affect the merits of the case.

Coming to the last plea raised by the learned counsel for the appellant in regard to non compliance of provisions of Section 50 of the Act. The learned counsel for the appellant has relied upon the decision in ***State of Himachal Pradesh*** v. ***Pawan Kumar*** with ***State of Rajasthan*** v. ***Bhanwar Lal*** 2005 Cri. L.J.2208. A perusal of this decision of Hon'ble Apex court shows that the term 'person' means human being with appropriate covering and clothings and footwear. It was held that bag, brief case or container carried by person cannot fall within ambit of 'person'. Section 50 does not apply to search of baggage, article or container carried by person searched. It is clear that it was held by their Lordships that the provisions of Section 50 will come into play only in case of personal search of the accused and not of some baggage or container etc.etc. which he may be carrying.

I may refer to the decisions relied upon by the learned Law Officer for respondent in support of his submissions. In ***State of Punjab*** vs. ***Baldev Singh*** (1999)6 Supreme Court Cases 172 the following observations were made and are relevant and are reproduced below:

> "It is an obligation of the empowered officer and his duty before conducting the search of the person of a suspect, on the basis of prior information, to inform the suspect that he has the right to require his search being conducted in the presence of a gazetted officer or a Magistrate. The failure to so inform the suspect of his right would render the search illegal because the suspect would not be able to avail of the protection which is inbuilt in Section 50. Similarly, if the person concerned requires, on being so informed by the empowered officer or otherwise, that his search be conducted in the presence of a gazetted officer or a Magistrate, the empowered officer is obliged to do so and failure on his part to do so would cause prejudice to the accused and also render the search illegal and the conviction and sentence of the accused based solely on recovery made during that search bad."

The observations made in paras 33 and 57 are relevant and are being reproduced:

> "The question whether or not the safeguards provided in Section 50 were observed would have, however, to be determined by the court on the basis of the evidence led at the trial and the finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish at the trial that the provisions of Section 50 and, particularly, the safeguards provided in that section were complied with, it would not be advisable to cut short a criminal trial."

The decision of Hon'ble Apex Court in ***Bharatbhai Bhagwanjibhai*** v. ***State of Gujarat*** 2003 Cri. L.J. 65 shows that their Lordships had considered the question when the search and seizure is made only on suspicion of reason of the fact that the accused started running on seeing the police party. There was no prior information to the police officer regarding commission of

offence under the Act. It was held that provisions of Section 50 are not applicable.

The above decisions lead to the inference that when a search is conducted on suspicion and there is no prior information available to the Investigating Officer regarding commission of offence under the Act, the provisions of Section 50 of the Act are not applicable. The question as to whether the provisions of Section 50 of the Act are applicable or not when the incriminating article is recovered on personal search of the accused was considered by this Court by Mr. Deepak Gupta, J in ***Gopal*** v. ***State of H.P.*** 2006(2) Shim. L.C. 97. In that case, the accused was carrying on one paper bag found tapped to waist with cello tape and a plea was taken in regard to non-compliance of the provisions of Section 50 of the Act relating to non-joining of independent witnesses. It was held that non-joining of independent witnesses by itself is not a sufficient ground to acquit the accused since the non-joining of independent witnesses was not deliberate and male fide but because of the circumstances beyond control.

In ***Jauni Ram*** v. ***State of H.P. 2005(1)*** (*supra*) Shim. L.C.54 it was held that non-joining of independent witnesses in view of the facts of the case was not fatal. Both these decisions are in regard to non-joining of independent witnesses but the present case, the driver and the conductor of the bus were associated who are not under the police and one of them i.e. Kashmir Singh Driver was also examined as PW-1 and, therefore, these decisions are not directly attracted to the facts of the present case.

The question of recovery at the time of routine checking was also considered by this Court in ***Baldev Singh's*** case (supra) as well as in ***Ram Lal and another*** v. ***State of H.P***.2005(1) Shim. L.C.158

In the decision in ***Ram Lal's case (supra)*** similar observations were made that mere non association of independent witnesses cannot lead to the conclusion that entire seizure and recovery is illegal.

The main question to be considered in the present case is as to the compliance of the provisions of Section 50 of the Act when the recovery is made suddenly on a routine checking or search and there is no prior information to the police officer. This point was considered by this Court in ***Harpal Singh*** v. ***State of H.P***. 2005(3) Shim.L.C.261 and reference was made to the decision of the Hon'ble Apex Court in ***Durgo Bai and another*** v. ***State of Punjab*** (2004) 7 SCC 144 and from the said judgment the following observations can be quoted, which reads as under:

> "The next argument is that Section 50 has been violated inasmuch as search was done without adhering to the conditions laid down in the Section. This is again based on the premise that the police officials concerned must be presumed to have acted on the basis of definite prior information. Once this assumption is held to be wrong, the ratio of the decision in State of Pubjab v. Balbir Singh, gets attracted. The legal position has been clarified thus : (SCC pp.308-09, para 5)
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> "But when a police officer carrying on the investigation including search, seizure or arrest empowered under the provisions of Cr. PC comes across a person being in possession of the narcotic drugs or psychotropic substances

> then two aspects will arise. If he happens to be one of those empowered officers under the NDPS Act also then he must follow thereafter the provisions of the NDPS Act and continue the investigation as provided thereunder. If on the other hand, he is not empowered then the obvious thing he should do is that he must inform the empowered officer under the NDPS Act who should thereafter proceed from that stage in accordance with the provisions of the NDPS Act. But at this stage the question of resorting to Section 50 and informing the accused person that if he so wants, he would be taken to a Gazetted Officer and taking to Gazetted Officer thus would not arise because by then search would have been over. As laid down in Section 50, the steps contemplated thereunder, namely informing and taking him to the Gazetted Officer should be done before the search. When the search is already over in the usual course of investigation under the provisions of Cr. PC then question of complying with Section 50 would not arise."

In ***Jauni Ram's case*** (supra) this Court had reproduced the decision of the Apex Court at page 65 and the following observation was made:

> "In State of Punjab v. Makhan Chand, [2004 (2) S.L.J. 980], the apex Court held that when the police party on patrol duty suddenly apprehends the accused, there is no need for compliance with Section 50 of the N.D.P.S. Act and the mere fact that no independent witness was joined is not fatal to the prosecution."

Thus, from the above decisions, it is very clear that when the police patrolling party suddenly apprehends the accused, there is no need for complying with the provisions of Section 50 of the Act. This plea had been considered by the learned trial Court

and a reference had been made to the decision of Gujarat High Court in ***Bharatbhai Bhagwanjibhai(supra)*** wherein it was observed that on seeing the police party, the accused became suspicious and started running and there was no prior information to the police regarding carrying of contraband illegally by the accused, he was apprehended by the police without adhering to the provisions of Section 50 of the Act. Reference was also made by the trial Court to the case of ***State of Punjab*** vs. ***Baldev Singh(supra)***

The net result after reference to the above decisions of the above cases would be that the provisions of Section 50 of the Act would not apply in case the empowered officer had no prior information and the recovery is made suddenly. I have no reason to differ with the reasoning given by the learned trial Court in this regard and as such the non-compliance of provisions of Section 50 of the Act does not prove fatal to the prosecution case.

There is statement of PW-1 Kashmir Singh Driver, PW-2 HC Balwant Singh and PW-6 HHC Roshan Lal who were members of the raiding party who have clearly stated about the manner in which the recoveries were effected and there are no contradictions or infirmities in their statements. The plea regarding non-examination of ASI Ram Lal Investigating Officerwas raised and answered by the learned trial Court was not raised before this Court since ASI Ram Lal had died and his signatures had been duly proved on the recovery memo. etc. by PW-7 ASI Lal Chand and PW-9 Inspector N.K.Sharma with whom ASI Ral Lal had worked.

No other point was urged during the course of arguments.

On consideration of the evidence on record, I am of the view that the findings of the learned trial court holding the appellant guilty under Section 20 of the 'Act' do not call for any interference by this Court and as such are liable to be quashed. No specific prayer was made regarding the sentence imposed except that the Court should take a lenient view. The learned trial Court has already taken a lenient view and had sentenced the appellant to rigorous imprisonment for four years and a fine of Rs.20,000/- and the said sentence does not call for an interference by this Court and as such, the findings recorded by the learned trial Court are liable to be affirmed and are accordingly upheld. The appeal has no merit and the same is hereby dismissed.

15th May, 2007 (V.K.Ahuja),J.
(sds)